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No. 84-1888

In the Supreme Court of the United States

OCTOBER TERM, 1985

MGPC, INC., PETITIONER

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner contends that the Federal Energy Administration improperly terminated an order granting it relief from the operation of petroleum product price control regulations.

1. Petitioner was an independent processor of natural gas. Regulations promulgated in 1973 pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, controlled the prices of natural gas liquid products, such as propane, that petitioner produced and sold. These regulations essentially froze petitioner's prices at their May 15, 1973 levels. Pet. App. 2a-3a.

In June 1974, petitioner applied to the Federal Energy Administration (FEA), a predecessor of the Department of Energy (see Pet. App. 2a n.1), for exception relief, seeking an order allowing it to increase its prices above their 1973 base levels. This increase, petitioner claimed, was necessary

to compensate it for an expected loss in 1974 and for alleged competitive disadvantages with respect to crude oil refiners. *Id.* at 3a. In November 1974, the FEA granted petitioner interim exception relief allowing it to raise its prices by 1.5 cents per gallon in order to compensate for the 1974 operating loss; however, the agency refused to grant petitioner the additional increase it requested to make up for competitive disadvantages, because these were not peculiar to petitioner (*id.* at 4a-6a, 197a-206a). Because the FEA was in the process of promulgating new industry-wide regulations for gas processors, it provided in the order that if new regulations were issued, the agency could "by written order rescind this interim exception approval in whole or in part; provided that, prior to taking any such action, the FEA shall inform [petitioner] of the proposed action and afford [it] an opportunity to comment upon that proposed action" (*id.* at 205). The order further provided that if new regulations were not issued by December 15, 1974, petitioner could apply for further exception relief (*ibid.*).

The new regulations were issued on December 24, 1974. These permitted petitioner to increase its prices for propane by 7.8 cents per gallon. Pet. App. 6a. In January and February 1975, the agency informed petitioner that it was not entitled to use the 1.5 cents per gallon increase in addition to the larger increase provided by the new regulations (*id.* at 7a-8a). In March 1975, the FEA issued a supplemental order formally rescinding the November 1974 interim exception relief granted petitioner (*id.* at 8a, 207a-211a). The supplemental order provided that it would become final unless petitioner filed with the agency within ten days "information which shows cause why the FEA action is erroneous in fact or law" (*id.* at 211a). Petitioner filed a response, which the agency explained in May 1975 was inadequate to demonstrate that the supplemental order should not take effect (*id.* at 8a, 220a-221a). "In direct

contrast to its previous representations," the FEA reasoned, "[petitioner] incurred no hardship during 1974 which warranted the approval of exception relief" (*id.* at 220a-221a). Accordingly, the supplemental order properly terminated the exception relief previously granted (*id.* at 221a).

2. Petitioner filed this action in 1979 in the United States District Court for the District of Wyoming, seeking to enjoin the Department of Energy from denying it the benefit of the November 1974 exception relief. The district court granted summary judgment in petitioner's favor, concluding that the exception relief had never been effectively terminated (Pet. App. 25a-58a; 581 F. Supp. 1047).

The court of appeals reversed and directed that summary judgment be entered in favor of the government (Pet. App. 1a-24a). The court held that the March and May 1975 orders effectively terminated the exception relief granted in November 1974 (*id.* at 12a-14a). It reasoned that the FEA was free to modify its earlier order granting exception relief and that petitioner did have notice of the termination and an opportunity to object to it. The court also held that the agency had voided the exception relief ab initio and that petitioner therefore was not entitled to take advantage of it for its 1974 sales (*id.* at 15a-19a). The court noted in this regard that petitioner did not in fact suffer the operating loss in 1974 that it had projected when it applied for exception relief (*id.* at 17a).

3. Petitioner argues (Pet. 11-16), without citation of authority, that the FEA never properly rescinded its 1974 grant of interim exception relief. The careful opinion of the Temporary Emergency Court of Appeals, "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), correctly rejected this factbound contention. Petitioner's

arguments, which relate to regulations long since rescinded* and to orders applicable to no other persons, obviously merit no further review.

Petitioner contends (Pet. 15) that it was entitled to notice of the proposed termination of its relief, an opportunity to comment on it, and a statement of the agency's reasons for its actions. Petitioner received all of these. It was informed on several occasions that it could not take advantage of both the November 1974 relief and the higher price allowed under the December 1974 regulations, and its response to the March 1975 order rescinding the exception relief was considered by the agency. The FEA's reasoning was set forth in detail in both its March and May 1975 orders (Pet. App. 207a-211a, 212a-223a). Moreover, when it granted the exception relief initially, the agency explained why petitioner's alleged competitive disadvantages did not justify additional price increases (*id.* at 202a-204a). Petitioner has pointed to nothing suggesting that the agency abused its discretion in deciding that petitioner was not entitled to relief beyond that provided in the December 1974 regulations. Cf. *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975) (agency had broad discretion in implementing oil entitlements program).

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*Prices of all petroleum products were decontrolled in January 1981. 46 Fed. Reg. 9909.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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